

**Laws, Regulations, Treaties, Executive Orders, Policies  
and  
Other References Applicable to  
Federal Actions in the Missouri River Basin**

Listed below are significant relevant laws, regulations, executive orders, management plans and policies that provide authority, limitations or guidance for federal agencies and actions taken by them for the recovery of listed species and related habitat within the Missouri River Basin. This list is not all inclusive. Depending on the nature and scope of the activity, other applicable guidance may apply to Federal activities. In addition, future laws, regulations and policies may also establish additional guidance that Federal agencies will be required to follow. The materials listed below have been identified by the Federal agencies as establishing significant constraints, conditions, parameters, sideboards, etc., for Federal actions.

**Enabling authority for establishing MRRIC:**

- **Endangered Species Act, 16 U.S.C. § 1533 (f)(2)**, <http://www.fws.gov/endangered/esaall.pdf>. Provides that the Secretary of the Interior, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection are not subject to the Federal Advisory Committee Act.
- **Missouri River Mainstem Reservoir System, Master Water Control Manual, Missouri River Basin**, <http://www.nwd-mr.usace.army.mil/rcc/reports/mmanual/MasterManual.pdf>. The Corps sets forth its general operational guidelines for the Missouri River reservoir system in a Master Manual and the operational details for each year in an Annual Operating Plan. The first Master Manual was published in 1960 and revised in 1973, 1975, 1979, 2004 and 2006. The year 1987 brought the onset of the first persistent drought in the region since the reservoir system had become fully operational. Because it found that the operational procedures in the 1979 Master Manual were not well-tailored to handle a persistent drought, the Corps began the revision process for what would become the 2004 Master Manual. The 2004 Record of Decision adopting the Master Manual committed the Corps to working with the USFWS in establishing a recovery implementation committee.
- **2003 Amended Biological Opinion, Operation of the Missouri River, Kansas River and Bank Stabilization and Navigation Project**, <http://www.nwd-mr.usace.army.mil/mmanual/mast-man.htm>. The Corps' operation of the reservoir system, generally capturing water in the upstream reservoirs to eliminate spring flooding and releasing water throughout the summer and fall as necessary to enable downstream navigation and restore reservoir capacity for the following spring, eliminated the spring rise and summer low flow from the hydrograph. The Reasonable and Prudent Alternative included with the 2000 BiOp (“2000 BiOp RPA”) stated that “higher spring and lower or declining summer flows than now exist” were “an integral component of the measures to

avoid jeopardy” to the three protected species. The 2000 BiOp RPA also mandated habitat restoration, a comprehensive species and habitat monitoring program, and an adaptive management framework to “implement, evaluate, and modify the components of the RPA in response to variable river conditions, species responses, and increasing knowledge base. The 2000 BiOp presented data from Corps models showing that, with the reservoirs and channel improvements in place, the “natural hydrograph” today would be expected to produce a spring rise of 80 Kcfs (Kcfs = thousand cubic feet per second) and a summer low flow of 10 Kcfs at the Gavin's Point Dam, the final reservoir release point into the lower river. Under the 1979 Master Manual, flow at that point was typically maintained steadily between 30-35 Kcfs from March through November. The 2000 BiOp RPA called instead for a spring rise from Gavin's Point totaling 50-55 Kcfs to be implemented about once every three years, and an annual summer low flow of 25 Kcfs, ramped down to 21 Kcfs from mid-July through mid-August. The flow required for minimum support of downstream navigation is about 28.5 Kcfs, depending upon the accompanying inflow from downstream tributaries. In the fall of 2003, the Corps presented a new Biological Assessment to the FWS and requested a new Biological Opinion. In response, the FWS issued an Amendment to the 2000 BiOp (“the 2003 Amended BiOp”). The 2003 Amended BiOp RPA permitted the Corps to avoid the summer low flow requirement on the condition that it construct 1,200 additional acres of shallow water habitat for the pallid sturgeon. In addition, it gave the Corps two more years to experiment with alternatives to a spring rise. If the Corps could not produce an acceptable alternative plan, the RPA imposed a default spring rise of reduced magnitude beginning in the spring of 2006. In addition to flow management actions the Service also addressed the establishment of a recovery implementation committee for the Missouri Basin.

### **Relevant Laws Regarding Water Resource Development Projects**

- **Administrative Procedures Act, 5 U.S.C. §§ 551 et seq.**, <http://www.archives.gov/federal-register/laws/administrative-procedure/553.html>. The APA provides for the judicial review of agency actions. Under this statute Courts review agency action to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
- **American Indians Religious Freedom Act, 42 U.S.C. §§ 1996**, [http://www.nps.gov/history/local-law/FHPL\\_IndianRelFreAct.pdf](http://www.nps.gov/history/local-law/FHPL_IndianRelFreAct.pdf). Enacted to protect and preserve the right of American Indians to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through traditional ceremonies and rites.
- **Antiquities Act, 16 U.S.C. §§ 431**, [http://www.nps.gov/history/local-law/FHPL\\_AntiAct.pdf](http://www.nps.gov/history/local-law/FHPL_AntiAct.pdf). This Act made excavation, theft or destruction of historic or prehistoric ruins or objects of antiquity on federal lands a criminal offense.

- **Archaeological Resources Protection Act, 16 U.S.C. 470 aa-mm,** <http://www.nps.gov/history/archeology/tools/laws/ARPA.htm>. This Act was enacted to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals (Sec. 2(4)(b)).
- **Archeological and Historic Preservation Act, 16 U.S.C. §§ 469,** Passed and signed into law in 1974, this act amended and expanded the Reservoir Salvage Act of 1960. The AHPA required that Federal agencies provide for "...the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of...any alteration of the terrain caused as a result of any Federal construction project of federally licensed activity or program (Section 1)." This greatly expanded the number and range of Federal agencies that had to take archeological resources into account when executing, funding, or licensing projects. The Reservoir Salvage Act had required such attention only of Federal agencies, mainly the Corps of Engineers and the Bureau of Reclamation, that constructed reservoirs and related structures. <http://www.nps.gov/history/archeology/tools/laws/AHPA.htm>
- **Clean Water Act, 33 U.S.C. §§ 1251 et seq.,** <http://www.epa.gov/watertrain/cwa/>. The CWA established the basic structure for regulating discharges of pollutants into the waters of the United States. It gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry. The Act made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions. These permits are issued by EPA or by state agencies who have been transferred this program authority by EPA. The Act also established the Corps 404 program for regulating the discharge of dredge or fill material into waters of the United States. The Clean Water Act also continued requirements to set water quality standards for all contaminants in surface waters. It also funded the construction of sewage treatment plants under the construction grants program and recognized the need for planning to address the critical problems posed by non-point source pollution.
- **Data Quality Act, 35 U.S.C. 3516,** <http://www.fws.gov/informationquality/section515.html>. The DQA requires federal agencies to issue information quality guidelines ensuring the quality, utility, objectivity and integrity of information that they disseminate and provide mechanisms for affected persons to correct such information.
- **Endangered Species Act, 16 U.S.C. §§ 1531 et seq.,** <http://www.fws.gov/endangered/whatwedo.html>. Under the ESA, if a government agency concludes that a proposed action may "jeopardize the continued existence" of any protected species or adversely affect its critical habitat, the agency must prepare a Biological Assessment and consult with the FWS. The FWS then issues a Biological Opinion ("BiOp") describing how the action will affect the species, based on the "best

scientific and commercial data available.” If the FWS concludes that the proposed action would cause jeopardy to an endangered or threatened species, the BiOp must include a Reasonable and Prudent Alternative which would allow the agency to implement the desired action while avoiding jeopardy to the species. Finally, if it appears incidental “take” will occur even if the Reasonable and Prudent Alternative is implemented, the BiOp must include an Incidental Take Statement setting conditions under which the agency may proceed while avoiding liability for the incidental harm to the protected species. The ESA prohibits “taking” of endangered species. “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

- **Energy Policy Act of 2005, Public Law 109-58,** <http://www.energy.gov/about/EPAct.htm>.
- **Federal Advisory Committee Act, 5 U.S.C. Appendix 2,** <http://www.archives.gov/federal-register/laws/fed-advisory-committee>. The Federal Government has long recognized the important role of the public in developing effective policies. Advisory committees are a way of ensuring public and expert involvement and advice in Federal decision-making. In response to the growing number of advisory committees, Congress enacted the Federal Advisory Committee Act (FACA) which established the guidelines under which all Federal advisory committees must operate. The number of advisory committees is carefully managed, ensuring that committees are only established when essential to the attainment of clearly defined Executive Branch priorities.
- **Fish and Wildlife Coordination Act, §16 U.S.C. §§ 661 et seq.,** <http://www.fws.gov/habitatconservation/fwca.htm>. The FWCA provides the basic authority for the Fish and Wildlife Service's involvement in evaluating impacts to fish and wildlife from proposed water resource development projects. It requires that fish and wildlife resources receive equal consideration to other project features. It also requires Federal agencies that construct, license or permit water resource development projects to first consult with the Service (and the National Marine Fisheries Service in some instances) and State fish and wildlife agency regarding the impacts on fish and wildlife resources and measures to mitigate these impacts.
- **Flood Control Act of 1944, Public Law 78-534, as amended,** <http://www.fws.gov/habitatconservation/wrda.htm>. Congress authorized the construction of a dam and reservoir system on the upper river to control the flooding. In addition to flood control, the FCA envisioned that the reservoirs would provide water for local irrigation projects, steady release into the river during the summer months to support downstream navigation, hydroelectric power generation and lake recreation. The FCA delegated construction and management of the main stem reservoir system to the Corps. The main stem dams and reservoirs are Fort Peck Dam (Fort Peck Lake) in Montana, Garrison Dam (Lake Sakakawea) in North Dakota, and Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case) and Gavins Point Dam (Lewis and Clark Lake) in South Dakota.

- **Freedom of Information Act (FOIA); 5 U.S.C. §§ 552,** <http://www.usdoj.gov/oip/index.html>. This act allows for the full or partial disclosure of previously unreleased information and documents controlled by the U.S. Government. The Act defines agency records subject to disclosure, outlines mandatory disclosure procedures and grants nine exemptions to the statute.
- **National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f,** <http://www.epa.gov/compliance/basics/laws.html>. The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. To meet this requirement, federal agencies generally prepare a detailed statement known as an Environmental Impact Statement (EIS) or an environmental assessment when for “Federal actions.”. This generally requires Federal agencies to analyze the environmental impacts of “Federal actions” and to prepare an EIS for any major Federal action “significantly affecting the quality of the human environments. Agencies may also prepare Environmental Assessments (EAs) for actions that do not have a significant effect on the environment.
- **National Historic Preservation Act, 16 U.S.C. §§ 470 et seq.,** <http://www.nps.gov/history/archeology/tools/Laws/NHPA.htm>. The NHPA created the national historic preservation partnership involving federal, tribal, state and local governments and the private sector. The Act requires federal agencies to survey and identify districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture, and use this information to plan projects so that, where possible, historic places are preserved. The NHPA also established the National Register of Historic Places. This Register identifies the significant national patrimony and provides federal recognition to properties of state and local, as well as national, significance. The Act also created the Advisory Council on Historic Preservation – charged with advising the President and the Congress on historic preservation matters and working with federal agencies to address historic resources in the fulfillment of their missions. Under the Act, there are matching grants, now called Historic Preservation Fund grants, to states, Certified Local Governments, and Indian tribes for historic preservation surveys, plans, and projects.
- **Native American Graves and Repatriation Act of 1990, 25 U.S.C. §§ 3001 et seq.,** <http://www.nps.gov/history/nagpra/>. The Native American Graves Protection and Repatriation Act (NAGPRA) is a Federal law passed in 1990. NAGPRA provides a process for museums and Federal agencies to return certain Native American cultural items -- human remains, funerary objects, sacred objects, and objects of cultural patrimony - to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations.
- **Rivers and Harbors Acts,** <http://www.fws.gov/habitatconservation/wrda.htm>
- **Water Resources Development Acts,** <http://www.fws.gov/habitatconservation/wrda.htm>

- **Wild and Scenic Rivers Act as amended, 16 USC 1271-1287)**  
<http://www.nps.gov/rivers/>. This act was established to protect the environmental values of free-flowing streams from degradation by impacting activities including water resources projects. The system is administered jointly by the Forest Service (Dept. of Agriculture) and the National Park Service (Department of the Interior). Corps activities in the rivers included in the system are subject to review by whichever of these agencies is responsible for the specific stream. Discharges into the stream, impoundments, diversions and other measures can alter the stream discharge, velocity, and channel dimensions. These changes may cause modifications to the free-flowing character of the stream, resulting in loss or diminution of its environmental values. The WASRA requires consideration of these impacts and consultation with the responsible agency prior to the implementation of a project.
- **NPS Mission, Organic Act of August 25 1916, (16 U.S.C. 1-4; 39 Stat. 535) as amended,** <http://www.nps.gov/legacy/organic-act.htm>
- **NPS Management Policies,** <http://www.nps.gov/refdesk/mp/index.html>

## **Partial Listing of Treaties with Native American Tribes of the Missouri River Basin**

### **THE 1851 TREATY AT FORT LARAMIE**

“Sioux or Dahcotah Nation”, “territory of the Gros Ventre, Mandans, and Arrickaras Nations”, “territory of the Blackfoot Nation”, and “territory of the Cheyennes and Arrapahoes”.

### **Three Affiliated Tribes of Fort Berthold**

Treaty at Fort Laramie, 1851

Agreement at Fort Berthold 1866

Executive Order of 1870

### **ARIKARA (Also RICARA; ARICKAREE)**

Treaty With The Arikara Tribe, 1825

### **MANDAN**

Agreement At Fort Berthold, 1866

Treaty With The Mandan Tribe, 1825

Treaty Of Fort Laramie With Sioux, Etc., 1851

### **SIOUX (Also DAKOTA; DAHCOTAH)**

Treaty With The Blackfeet Sioux, 1865

Treaty With The Hunkpapa Band Of The Sioux Tribe, 1825

Treaty With The Sioune And Oglala Tribes, 1825 (Also Ogallala)

Treaty With The Oto, Etc., 1836 — Yankton and Santee Bands

Treaty With The Sauk And Foxes, Etc., 1830 — Medawah-Kanton, Wahpacoota, Wahpeton, Sissetong [Sisseton], Yanckton [Yancton] and Santie Bands

Treaty With The Sioux Of The Lakes, 1815

Treaty With The Sioux Of St. Peter's River, 1815  
Treaty With The Sioux, 1816  
Treaty With The Teton, Etc., Sioux, 1825 — Teton, Yancton and Yanctonies Bands  
Treaty With The Sioux—Sisseton And Wahpeton Bands, 1851  
Treaty With The Sioux—Mdewakanton And Wahpakoota Bands, 1851 (Also Med-ay-wa-kan-toan and Wah-pay-koo-tay)  
Treaty Of Fort Laramie With Sioux, Etc., 1851  
Treaty With The Sioux, 1858 — Mendawakanton and Wahpahoota Bands  
Treaty With The Sioux, 1858 — Sisseton and Wahpaton Bands  
Treaty With The Sioux—Miniconjou Band, 1865 (Also Minneconjou)  
Treaty With The Sioux—Lower Brulé Band, 1865  
Treaty With The Sioux—Two-Kettle Band, 1865  
Treaty With The Sioux—Sans Arcs Band, 1865  
Treaty With The Sioux—Hunkpapa Band, 1865 (Also Onkpahpah)  
Treaty With The Sioux—Yanktonai Band, 1865  
Treaty With The Sioux—Upper Yanktonai Band, 1865  
Treaty With The Sioux—Oglala Band, 1865 (Also Ogallala; O'Galla)  
Treaty With The Sioux—Sisseton And Wahpeton Bands, 1867 (Also Sissiton)  
Treaty With The Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, And Santee—and Arapaho,  
Treaty With The Sioux, 1805  
Agreement With The Sisseton And Wahpeton Bands Of Sioux Indians, 1872 (Unratified)  
Amended Agreement With Certain Sioux Indians, 1873 — Sisseton and Wahpeton Bands  
Agreement With The Sioux Of Various Tribes, 1882–83 (Unratified) – Pine Ridge, Rosebud, Standing Rock, Cheyenne River, and Lower Brulé Agencies  
Treaty With The Yankton Sioux, 1858

## **CROW**

Treaty With The Crow Tribe, 1825  
Treaty With The Crows, 1868  
Agreement With The Crows, 1880 (Unratified)  
Treaty Of Fort Laramie With Sioux, Etc., 1851

## **ARAPAHO** (Also ARRAPAHOE; ARAPAHOE)

Treaty With The Apache, Cheyenne, And Arapaho, 1865  
Treaty With The Arapaho And Cheyenne, 1861  
Treaty With The Cheyenne And Arapaho, 1865  
Treaty With The Cheyenne And Arapaho, 1867  
Treaty With The Northern Cheyenne And Northern Arapaho, 1868  
Treaty Of Fort Laramie With Sioux, Etc., 1851 Treaty With The Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, And Santee—and Arapaho,

## **ASSINABOINE**

Treaty Of Fort Laramie With Sioux, Etc., 1851

**BLACKFEET** (Also BLACKFOOT; BLACKFOOT NATION)

- Treaty With The Blackfeet, 1855
- Treaty With The Blackfeet Sioux, 1865

**CHEYENNE** (Also CHAYENNE)

- Treaty With The Apache, Cheyenne, And Arapaho, 1865
- Treaty With The Arapaho And Cheyenne, 1861
- Treaty With The Cheyenne Tribe, 1825
- Treaty With The Cheyenne And Arapaho, 1865
- Treaty With The Cheyenne And Arapaho, 1867
- Treaty With The Northern Cheyenne And Northern Arapaho, 1868
- Treaty Of Fort Laramie With Sioux, Etc., 1851

**GROS VENTRES** (Also GROSVENTRES)

- Treaty With The Blackfeet, 1855
- Agreement At Fort Berthold, 1866
- Treaty Of Fort Laramie With Sioux, Etc., 1851

**IOWA** (Also IAWAY; IOWAY)

- Treaty With The Iowa, 1815
- Treaty With The Iowa, 1824.
- Treaty With The Iowa, Etc., 1836.
- Treaty With The Iowa, 1837
- Treaty With The Iowa, 1838
- Treaty With The Iowa, 1854
- Treaty With The Sauk And Foxes, Etc., 1830
- Treaty With The Sauk And Foxes, Etc., 1861
- Treaty With The Sioux, Etc., 1825

**OMAHA** (OMAHAW)

- Treaty With The Omaha, 1854
- Treaty With The Omaha, 1865
- Treaty With The Oto, Etc., 1836
- Treaty With The Sauk And Foxes, Etc., 1830

**PONCA** (Also PONCAR; PONCARAR)

- Treaty With The Ponca, 1817
- Treaty With The Ponca, 1825
- Treaty With The Ponca, 1858
- Treaty With The Ponca, 1865
- (\*Ponca Tribe of Nebraska was terminated by Congressional Act in 1968 and later restored in 1990.)

**POTAWATOMI**

- Treaty With The Potawatomi, 1861
- Treaty With The Potawatomi, 1867

**SAC & FOX** (Also SACK, SAUK, SOCK)

Treaty With The Sauk And Foxes Of Missouri, 1837

Treaty With The Sauk And Foxes Of Missouri, 1854

**SHOSHONI** (Also SHOSHONE)

Treaty With The Eastern Shoshoni, 1863

**Tribal Consultations**

- Executive Order 13084, Consultation and Coordination with Indian Tribal Governments,  
<http://indian.senate.gov/13084.htm>
- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments
- Presidential Memorandum dated September 23, 2004, Government-to-Government Relationship with Tribal Governments,  
<http://mits.doi.gov/cadr/main/G2GRelationshipwithTribal.cfm>
- Presidential Memorandum April 29, 1994, Government-to-Government Relations with Native American Tribal Governments,  
<http://mits.doi.gov/cadr/main/PresidentialMemoTribe.cfm>
- Secretarial Order 3206 June 5, 1997, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,  
<http://www.fws.gov/southwest/es/arizona/3206.html>
- Secretarial Order 3261 May 23, 2005, Realignment of Functions Relating to the Native American Graves Protection and Repatriation Act,  
<http://www.nps.gov/history/nagpra/MANDATES/INDEX.HTM>
- U.S. Department of Defense (1998), American Indian and Alaska Native Policy,  
<http://www.usace.army.mil/cw/cecwo/reg/DoDPolicy.pdf>
- U.S. Department of the Interior (1995), Departmental Responsibilities for Indian Trust Resources, <http://www.fws.gov/endangered/tribal/index.html>
- U.S Bureau of Reclamation (1998), Indian Policy of the Bureau of Reclamation
- U.S. National Park Service (2001), A compilation of NPS management policies pertaining to Native Americans  
<http://www.nps.gov/policy/NativeAmericanPolicies.htm>
- U.S. Geological Survey (1995), U.S. Geological Survey Manual, Section 500.4 Policy on Employee Responsibility Towards American Indians and Alaska Natives.  
<http://www.usgs.gov/usgs-manual/500/500-4.html>

- U.S. Environmental Protection Agency (1984), Region 8 Policy for Environmental Protection in Indian Country (<http://www.epa.gov/indian/r8pol.htm>)
- U.S. Department of Justice (1999), Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes. (<http://www.usdoj.gov/otj/sovtrb.htm>)
- Advisory Council for Historic Preservation (2000) ACHP Policy Statement Regarding ACHP's Relationship with Indian Tribes. (<http://www.achp.gov/policystatement-tribes.html>)

### **Missouri River Basin, Interstate Compacts and Decrees and International Treaties**

- Arkansas River Compact, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- Belle Fourche River Compact, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- Laramie Decree, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- North Plate Decree, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- Upper Niobrara River Compact, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- Republican River Compact, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- South Platte River Compact, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- Yellowstone River Compact, [http://www.fws.gov/laws/laws\\_digest/compact.html](http://www.fws.gov/laws/laws_digest/compact.html)
- 1909 Boundary Water Treaty between the United States and Canada, <http://www.ijc.org/rel/agree/water.html>. Applicable to the following waterways in the Missouri River Basin:
  - Milk River and its Tributaries
  - Popular River
  - Big Muddy Creek

### **Relevant Management Plans**

- Pallid Sturgeon Recovery Plan (November 1993), U.S.F.W.S., Department of the Interior, <http://www.fws.gov/yellowstonerivercoordinator/pallidsturgeon.html>
- Great Lakes and Northern Great Plains Piping Plover Recovery Plan (May 1988, U.S. F.W.S., Department of the Interior, <http://www.fws.gov/midwest/endangered/pipingplover/>)

- Interior Population of the Least Tern, *Sterna Antillarum* (September 1990), U.S.F.W.S., Department of the Interior, <http://www.nwd-mr.usace.army.mil/rcc/mrric.html>
- Missouri River National Recreational River Resource Management Plan
- Upper Missouri Breaks National Monument Resource Management Plan, <http://training.fws.gov/library/ccps.htm>
- Charles M. Russell National Wildlife Refuge Comprehensive Conservation Plan, <http://training.fws.gov/library/ccps.htm> )
- DeSoto National Wildlife Refuge Comprehensive Conservation Plan, <http://training.fws.gov/library/ccps.htm>
- Big Muddy National Wildlife Refuge Comprehensive Conservation Plan, <http://training.fws.gov/library/ccps.htm>

**OMB/CEQ Memorandum on Environmental Conflict Resolution,**

<http://www.ecr.gov/ecrpolicy/policy.htm>

Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving, <http://www.ecr.gov/ecrpolicy/policy.htm>

**OMB Memorandum M-05-03 dated December 16, 2004, subject: Final Information Quality Bulletin for Peer Review**, <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf>– Establishes requirements for peer review of government sponsored research.

**Court Cases**

1. **South Dakota v. Ubbelohde [70kb PDF, 31 pages]**, 330 F. 3d 1014 (8<sup>th</sup> Cir.2003), rehearing and rehearing en banc denied September 30 , 2003. cert. denied North Dakota v. Ubbelohde, 541 U.S. 987, 124 S.Ct. 2015, 158 L.Ed.2d 490, 72 USLW 3451, 72 USLW 3656 (U.S. Apr 19, 2004) (NO. 03-935). In the spring of 2002, the states of North Dakota, South Dakota, Montana, and Nebraska and the Lower Brule and Crow Creek Sioux Tribes each brought separate federal district court proceedings in their respective states against the Corps seeking injunctions against the Corps operations of the Missouri River mainstem system of dams. These suits alleged, among other things, that the Corps was or was not following the dictates of the 1944 Flood Control Act in the operation of the Mainstem Projects. In the federal court proceedings in North Dakota, South Dakota, and Montana the district courts each ordered the Corps to restrict releases from the mainstem projects located in their respective states. In Nebraska the district court ordered the Corps to operate in accordance with the Corps' current Master Manual for the Mainstem System. In light of the conflicting injunctions the Corps sought and received a stay of these injunctions from the Eighth Circuit Court of Appeals on May 22, 2002, while its appeal of the preliminary injunctions was pending before that court. On June 4, 2003, the United States Court of Appeals for the Eighth Circuit reversed the

preliminary injunctions issued in each of the lower court proceedings except for the preliminary injunction issued by the District Court of Nebraska which required the Corps to operate the System in accordance with the current Mainstem Master Manual. The Court held that the dominant functions of the 1944 Flood Control Act were to avoid flooding and maintain downstream navigation. While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for. Because the Flood Control Act calls on the Corps to balance these various interests, the courts can review the Corps' decisions to ensure that it considered each of these interests before making a decision. The Master Manual is binding on the Corps and the Courts can review the Corps actions to ensure conformity.

2. **North Dakota v. U.S. Army Corps of Engineers**, 270 F.Supp.2d 1115 (D.N.D.2003). North Dakota filed suit against the Corps in state court under the Clean Water Act and received a temporary restraining order limiting releases from the Corps Garrison Project. This case was removed to Federal District Court, which subsequently denied North Dakota's Motion for a preliminary injunction in July 2003. The court held that the Corps compliance with the Clean Water Act is subject to judicial review. Although the Corps of Engineers has been held liable for non-compliance with state water quality laws in one other reported decision, the courts have yet to see one state along a major river system comprised of several dams and reservoirs spread over many states succeed in a state water quality standards enforcement action. Section 511 [33 U.S.C. § 1371] provides sovereign immunity protection for the Corps of Engineers when compliance with the Clean Water Act may "affect or impair" the authority of the Corps of Engineers to "maintain navigation."
3. **In re Operation of the Missouri River System Litigation, North Dakota v. U.S. Army Corps of Engineers [140kb PDF, 51 pages]**, 320 F.Supp.2d 873 (D.Minn.2004), affirmed in part by In re Operation of Missouri River System Litigation, 418 F.3d 915, 61 ERC 1052, 35 Env'tl. L. Rep. 20,168 (8th Cir.(Minn.) Aug 16, 2005) (NO. 04-2204), cert. den. by North Dakota ex rel. North Dakota Dept. of Health v. U.S. Army Corps of Engineers, 547 U.S. 1018, 126 S.Ct. 1568, 164 L.Ed.2d 298, 74 USLW 3309, 74 USLW 3527, 74 USLW 3530, 62 ERC 1608 (U.S. Mar 20, 2006) (NO. 05-628). District Court decision dismissing North Dakota CWA case against the Corps. The Court held that Section 1371 provides sovereign immunity for the Corps when compliance with North Dakota's water quality standards might affect or impair the authority of the Corps to maintain navigation. The Court was also persuaded by the doctrine of preemption that requiring the Corps to comply with North Dakota's water quality standards irrespective of the Corps' other obligations and existing river conditions circumvents the intention of Congress in its enactment of the FCA and the CWA. The Court found that it could not order that the Corps to violate its federal statutory obligations under the Flood Control Act to comply with a state water quality standard.
4. **In Re Operation of the Missouri River System, North Dakota v. United States Army Corps of Engineers [24kb PDF, 31 pages]**, 418 F. 3d 915 (8<sup>th</sup> Cir.2005). Appeal to the 8<sup>th</sup> Circuit of North Dakota's Clean Water Act case. The court held that the Corps, in its maintenance of river levels, was exempt from compliance with North Dakota's water quality standards, to extent standards interfered with Corps' obligation under Flood

Control Act (FCA) to control flooding and maintain downstream navigation. The CWA's preservation of sovereign immunity where the Corps' authority to maintain navigation would be affected and the principles of preemption preclude the enforcement of North Dakota's state water-quality standards against the Corps' releases of water from Lake Sakakawea. Therefore, the district court did not err in dismissing North Dakota's complaint.

5. **American Rivers v. United States Army Corps of Engineers**, 271 F.Supp. 2d 230 (D.D.C. 2003). Under the Endangered Species Act, government agencies are obligated to protect endangered and threatened species to the extent that their governing statutes provide them the discretion to do so. 1944 FCA provides the Corps the discretion to consider its obligations to comply with the Endangered Species Act as one of the “other interests” to be balanced when making river management decisions under the FCA, and such ESA compliance can come at the expense of other interests, including navigation and flood control in light of congressional intent to give endangered species priority over primary mission of federal agencies.
6. **American Rivers v. United States Army Corps of Engineers**, 274 F. Supp. 2d 62 (D.D.C. 2003). District Court imposes fines of \$500,000 per day for civil contempt regarding order to comply with 2000 BiOp.
7. **In Re Operation of the Missouri River System Litigation**, 277 F.Supp.2d 1378 (Jud. Pan. Mult.Lit. 2003). Interested parties filed lawsuits in various districts, seeking to protect their interests. In July 2003, the multi-district litigation panel consolidated these actions and transferred them to the District Court for the District of Minnesota. File No. 03-1555 (PAM).
8. **In Re Operation of the Missouri River System [140kb PDF, 51 pages]**, 363 F.Supp.2d 1145 (D.Minn.2004), *Affirmed in Part, Vacated in Part by In re Operation of Missouri River System Litigation*, 421 F.3d 618, 61 ERC 1038, 35 Env'tl. L. Rep. 20,173 (8th Cir.(Minn.) Aug 16, 2005) (NO. 04-2737, 04-2794, 04-2774, 04-2878, 04-2785, 04-2994), cert. den. by North Dakota v. U.S. Army Corps of Engineers, 547 U.S. 1097, 126 S.Ct. 1879, 164 L.Ed.2d 566, 74 USLW 3308, 74 USLW 3597, 74 USLW 3598, 63 ERC 1128 (U.S. Apr 24, 2006) (NO. 05-611), Environmental Defense v. U.S. Army Corps of Engineers, 547 U.S. 1097, 126 S.Ct. 1879, 164 L.Ed.2d 566, 74 USLW 3324, 74 USLW 3597, 74 USLW 3598 (U.S. Apr 24, 2006) (NO. 05-631) and by Nebraska Public Power Dist. v. U.S. Fish and Wildlife Service, 547 U.S. 1097, 126 S.Ct. 1880, 164 L.Ed.2d 566, 74 USLW 3371, 74 USLW 3597, 74 USLW 3598 (U.S. Apr 24, 2006) (NO. 05-782). In this case, multiple basin stakeholders challenged the Corps 2004 Revised Master Manual and the 2003 Amended Biological Opinion. In upholding the Corps revised Manual and the USFWS's 2003 Amended Biological Opinion, the court held that the FCA requires that the Corps must strike a balance among many interests, including flood control, navigation and recreation; the Corps' obligations under the ESA are within the scope of these interests. Because of this balance the Court may only review the Corps actions to ensure that the Corps considered all river interests when formulating a given plan. The language of the FCA does not require a particular outcome, but rather that the Corps

considers all interests in its operations. There is no language in either case law or legislative history that dictates that the Corps must always maintain a particular water level or specific water season in its river operations.

9. **In Re Operation of the Missouri River System [78kb PDF, 33 pages]**, 421 F.3d 618 (8<sup>th</sup> Cir. 2005). Appeal of the District of Minnesota's decision sustaining the 2004 Revised Master Manual and the 2003 Amended Biological Opinion. The Eighth Circuit held that: the Flood Control Act (FCA) did not impose any duty upon Army Corps of Engineers to maintain minimum level of downstream navigation independent of consideration of other interests; Corps was not required under FCA to give priority to interests according to their relative economic value; Corps could exercise its discretion in determining how best to fulfill purposes of reservoir system's enabling statute; ESA claims were moot that challenged conditional summer low flow element of reasonable and prudent alternative (RPA) in biological opinion; biological opinion (BiOp) did not have to include specific operational profile in environmental baseline; Fish and Wildlife Service (FWS) utilized best scientific data on summer low flow in formulating amended biological opinion for protected species; every detail of agency's decision did not have to be expressly stated in amended BiOp; and FWS was not required to ensure success of its amended plan. The FCA has been interpreted to hold flood control and navigation dominant and recreation, fish and wildlife secondary. If, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish and wildlife on the other, the priorities established by the FCA would forbid the abandonment of flood control or navigation. The court stated that their holding that the 2004 Master Manual does not 'abandon' navigation, does not rule out the possibility that some more limited degree of support for flood control or navigation in the future could be held to constitute 'abandonment' of these dominant functions. The opinion further stated that nothing in the text or legislative history of the FCA suggests that Congress intended the priority of interests under the FCA to shift according to their relative economic value and that arguments based on the wisdom of the priorities established by the FCA must be addressed to Congress. The 2004 Master Manual demonstrates that the Corps can comply with the elements of the 2003 Amended BiOp RPA while continuing to operate the dams 'consistent with the purposes stated by Congress' in the FCA. If future circumstances should arise in which ESA compliance would force the Corps to abandon the dominant FCA purposes of flood control or downstream navigation, the ESA would not apply.
10. **American Rivers, Inc. et al., v. United States Army Corps of Engineers et al. [331kb PDF, 10 pages]**, Civil No. 04-3188 (PAM/RLE), December 10, 2004. American Rivers and other environmental interests brought suit in the District Court, District of Minnesota, on July 9, 2004, against the Corps seeking declaratory and injunctive relief concerning the Corps' and USFWS' determination under the 2003 the Amended BiOp that over 1200 acres of shallow water habitat had been created. The creation of this habitat had allowed the Corps to operate the Mainstem System at flows exceeding 25,000 cfs during July and August 2004. In a Memorandum and Order dated December 10, 2005, Judge Magnuson granted the Corps' and USFWS's Motion for Summary Judgment. The court found that American Rivers had failed to provide the appropriate sixty-day (60) notice against the

Corps under the Endangered Species Act before bringing suit and thus dismissed the claims against the Corps. With respect to the claims regarding implementation of the reasonable and prudent alternative the court found these claims to be moot since the challenged operations had already been complete. The court also declined to rule on whether the next year's operations would violate the 2003 Amended BiOp since challenges to that opinion were currently pending before the 8<sup>th</sup> Circuit. American Rivers appealed the dismissal of their complaint. However, the appeal was subsequently withdrawn by American Rivers.

11. **In Re Operation of the Missouri River System, State of Missouri, ex rel. Jeremiah W. (Jay) Nixon v. USACE, Francis J. Harvey, Secretary of the Army and Brigadier General Gregg F. Martin [507kb PDF, 13 pages]**. On May 24, 2006, the State of Missouri filed a new complaint in the District of Minnesota challenging the adequacy of the Corps's NEPA compliance for the spring rise technical criteria. Judge Magnuson, in his 2004 decision concerning challenges to the 2004 Master Manual and 2003 Amended Biological Opinion had concluded that a challenge to the Corps NEPA coverage of the USFWS's spring rise plan in the BiOp was not at that time ripe for review. In the new litigation, Missouri claimed that the Corps EA and Memorandum of Decision finding that the environmental impacts of the spring rise were adequately covered in the 2004 Master Manual Review and Update EIS were arbitrary and capricious and the Corps should have completed a supplemental EIS. The State of Nebraska was granted leave to participate as an amicus in the case. Oral argument was held on September 22, 2004 and on November 2, 2006 the court held in favor of the Corps. Judge Magnuson found that the Corps did not violate NEPA by preparing and EA rather than a supplemental EIS when it implemented the revisions to the Master Manual incorporating the spring rise technical criteria. The Court found the Corps also complied with NEPA in its consideration of a range of alternatives and fully analyzed the environmental impacts of the revision. Missouri has now appealed this decision to the 8<sup>th</sup> Circuit Court of Appeals. All briefs have been submitted and the parties are awaiting oral argument schedule to be set by the court.